

Before the
COPYRIGHT ROYALTY JUDGES
Washington, DC

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In the Matter of)	Docket No. 2012-6 CRB CD 2004-2009
)	(Phase II)
Distribution of the 2004-2009)	
Cable Royalty Funds)	
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In the Matter of)	Docket No. 2012-7 CRB SD 1999-2009
)	(Phase II)
Distribution of the 1999-2009)	
Satellite Royalty Funds)	
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**SETTLING DEVOTIONAL CLAIMANTS' RESPONSE TO
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Pursuant to 37 C.F.R. § 351.14 and the Judges' *Order on Joint Motion Re Post-Hearing Scheduling*, dated April 19, 2018, the Settling Devotional Claimants ("SDC") hereby submit their Response to Independent Producers Group's ("IPG") Proposed Findings of Fact and Conclusions of Law.

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I. RESPONSE TO PROPOSED FINDINGS OF FACT

A. Viewership Can Be a Reliable Measure of Relative Value for Programs Within a Genre.

1. **IPG ¶¶ 45, 117-119.** SDC witness Ms. Toby Berlin is qualified as an expert in cable and satellite television programming. Ex. 7003 (Berlin Designated Oral Testimony) at Tr. 75:19-76:11. Ms. Berlin confirms that cable and satellite system operators “viewed ratings as a principal measure of value within a defined genre of programming.” Ex. 7002 (Berlin Designated WDT) at 7. Ms. Berlin’s testimony directly addresses the Judges’ concern in the 2000-03 cable proceeding, that “none of the parties proffered admissible testimony (written or oral) of a witness with knowledge of CSO programming.” *Distribution of the 2000-2003 Cable Royalty Funds*, Final Distribution Order, Docket No. 2008-2 CRB CD 2000-03 (Phase II), 78 Fed. Reg. 64984, 64992 n.28. (Oct. 30, 2013), aff’d in part, *Independent Producers Group v. Librarian of Congress*, 792 F.3d 132 (D.C. Cir. 2015), vacated in part on other grounds, *Settling Devotional Claimants v. Copyright Royalty Board*, 797 F.3d 1106 (D.C. Cir. 2015). Ms. Berlin’s testimony contradicts IPG’s unsupported assertion, leveled against the MPAA-Represented Program Suppliers (“MPAA”) at ¶ 45, that there was no witness with knowledge of CSO/SSO programming “capable of confirming whether CSO/SSOs consider viewership ratings significant to their decision to transmit a program.”

2. **IPG ¶¶ 45, 117-120.** Ms. Berlin’s testimony is corroborated by Mr. John Sanders, who has decades of experience in the television broadcast, cable, and satellite industry as an appraiser of media assets, including television programs. Ex. 7001 (Sanders WDT) at App. A, Qualifications of John S. Sanders; Tr. 163:12-17; Tr. 164:1-5 (Sanders). Mr. Sanders confirms that within a genre of programming, viewership is a measure of value to cable and satellite

operators, because of the commonsense recognition in his experience that “viewing begets subscribers.” Tr. 175:10-21 (Sanders).

3. **IPG ¶¶ 45, 117-120.** Ms. Berlin’s and Mr. Sanders’s experience comports with economic theory as set forth by expert economist Dr. Erkan Erdem. The value of a program to a cable or satellite system is in the program’s ability to attract and retain subscribers. Ex. 7000 (Erdem WDT) at 10 (“Operators are profit maximizing entities that construct bundles (or packages) of channels to attract and retain subscribers.”); Ex. 7001 (Sanders WDT) at 17; Tr. 177:18-178-7 (Sanders); Ex. 7002 (Berlin WDT) at 3-4. The most compelling reason for a subscriber to subscribe to a cable or satellite service is to watch available programs, viewers are likely to watch those programs that are valuable enough to attract and retain them, and are comparatively less likely to watch programs that they do not value. Ex. 7000 (Erdem WDT) at 12; Tr. 175:17-21, 177:25-178:4 (Sanders); Ex. 7002 (Berlin WDT) at 7.

4. **IPG ¶ 44, 120.** IPG failed to present any witness or testimony to support its assertion that there is an “inverse correlation” between “distant viewership” and “distant subscribership.” Additionally, IPG’s Proposed Findings at ¶¶ 44 and 120 misstate record evidence. Mr. Sanders testified about trends in projected television household ratings of Devotional content, not “distant viewership.” *See* Ex. 7001 (Sanders WDT) at 6-12. Also, Mr. Sanders did *not* acknowledge there was an inverse correlation between distant viewership and distant subscribership. Tr. 213:13-24; 218:4-18 (Sanders). Indeed, IPG’s Proposed Findings provides no citation for that putative finding. The fact that cable royalty fees have increased over time does not establish that cable subscribership as a whole has increased over time. To the contrary, Mr. Sanders testified, “And actually cable subscribership has been going down.” Tr. 213:22-23 (Sanders). Further, the total number of distant subscribers is only one of many factors entering into the total amount of

fees paid. Tr. 213:4-24 (Sanders). Other factors include the number and types of distant signals retransmitted; the number of cable and satellite systems; the distribution of subscribers between local and distant markets within cable and satellite systems; the level of subscription fees charged to subscribers; and the regulatory fee calculation formula and rates. 17 U.S.C. § 111(d). All of these factors change over time.

5. **IPG ¶ 119.** IPG also misstates Dr. Erdem’s testimony. Dr. Erdem did *not* “acknowledge[] that CSOs do not look at viewership ratings.” That was not the question he was asked:

Q. Okay. So essentially what you’re saying is maybe CSOs say they don’t look at ratings when they make their decisions, but we don’t have any data other than ratings to distinguish between programs?

A. And I cannot imagine a better data.

Tr. 95:1-6 (Erdem). It was IPG’s counsel, and not Dr. Erdem, who asserted, without foundation, that “CSOs ... don’t make their decision based on viewing.” Tr. 92:17-2 (Boydston). SDC’s counsel objected to that assertion, and the objection was sustained. Tr. 92:23-93:2. As Ms. Berlin testified, system operators do rely on Nielsen ratings when making judgments relating to the value of programming. Ex. 7003 at Tr. 78:4-83:19 (Berlin); Ex. 7002 (Berlin) at 3, 7.

B. Local Ratings Are Predictive of Distant Viewing.

6. **IPG ¶¶ 93-95, 121-122.** There is abundant record evidence showing that local ratings are predictive of distant viewing. Dr. Erdem’s analyses based on local ratings and distant viewing data from 1999 through 2003 are important pieces of that evidence. His regressions show that the correlation between local ratings and distant viewing is positive and statistically significant, and that this relationship does not degrade over time, indicating that changes in the marketplace tend to affect local and distant viewership in similar ways. Ex. 7000 (Erdem WDT)

at 19-20; Tr. 63:5-64:17 (Erdem). Like Dr. Erdem, the regressions of MPAA's econometric expert, Dr. Gray, "demonstrate that there is a positive and statistically significant relationship between local ratings and distant viewing." MPAA Proposed Findings of Fact ¶ 72.

7. **IPG ¶¶ 93-95, 121-122.** But even more important – and not to be overlooked – is the knowledge and experience of industry professionals like Ms. Berlin and Mr. Sanders, both of whom testified that local ratings are predictive of viewership out-of-market, and that industry professionals rely on local ratings to make predictions as to out-of-market performance. Ex. 7003 at Tr. 81:8-82:11 (Berlin); Ex. 7001 (Sanders WDT) at 14-15; Tr. 185:20-186:20 (Sanders). Statistical analysis is useful, of course. But it is a supplement to, and not a substitute for, the experience of market participants whose job it is to make business judgments of relative value. Ex. 7001 (Sanders WDT) at App. A; Ex. 7002 (Berlin WDT) at Ex. 1; Ex. 7003 at Tr. 61:13-20 (Berlin). Not all problems in life can be solved through data analysis alone. *See* Tr. 188:6-22 (Sanders) ("[A]t the end of the day, there's also an element of rationality and common sense that comes into play . . .").

C. Most of IPG's Criticisms of Dr. Erdem's Use of Average Local Sweeps Ratings Are Based on a Misunderstanding of Dr. Erdem's Methodology.

8. **IPG ¶¶ 97-99, 102, 107-110, 112-113.** As Dr. Erdem explains in his Written Direct Testimony, his methodology is based on average local sweeps ratings of regularly scheduled programs that meet Nielsen's reportability standards for inclusion in Nielsen's Reports on Devotional Programming ("RODP"), scaled by the number of distant subscribers. Ex. 7000 (Erdem WDT) at 6-7, 13-15. He does not use – or even have – broadcast-level information for local ratings. *Id.* "A methodology based on volume is not a reliable method because viewers and Operators may value a 30-minute program more than they value a 90-minute program. ... [A] determination of relative market value should not be based on total hours or total number of

programs.” *Id.* at 9. Dr. Erdem’s focus, and the focus of the RODPs, is whether the program is broadcast on a regular basis, not how often or how long the broadcasts are. “[W]ith rare exception, programs that are not scheduled on a regular basis are less likely to drive subscriptions than regularly scheduled programs (such as the ones captured by the Nielsen reports).” *Id.* at 9 n.14; *see also* Tr. 240:9-17 (Sanders) (“To attract a subscriber, I would argue there has to be some level of predictability to the program.”).

9. **IPG ¶¶ 91.** In certain instances when a Devotional program that appeared in the R-7 national average summary table of the RODP did not have sufficient viewing to meet a minimum rating value (for example, where a program had a national average rating of below 0.1%), Nielsen denoted the value by the letters “LT” or the caret symbol “<<.” Ex. 7005 at 3 (NSI May 1999, Col. 7) and 12 (various columns) (Mayhue Declaration); Tr. 3198:25-319:6 (Lindstrom). Dr. Erdem was able to calculate a national average using detailed program information from within the RODP. Ex. 7000 (Erdem WDT) at 14-15; Tr. 111:11-18 (Erdem). In other words, “instead of looking at the [R-7] summary, I look at the details that create the summary.” Tr. 113:16-25 (Erdem). The only claimant to benefit from Dr. Erdem’s additional analysis was represented by IPG, James Robeson (for Life Today). Tr. 112:3-13 (Erdem). IPG presented no record evidence to challenge Dr. Erdem’s decision to do this additional calculation, nor did IPG present any evidence that it was prejudiced by Dr. Erdem’s methodological approach.

10. **IPG ¶¶ 97-99, 102, 107-110, 112-113.** IPG confuses Dr. Erdem’s methodology with Dr. Gray’s methodology. Dr. Gray’s *viewership-hours* methodology uses market-level metered data and imputed viewership, on a quarter-hour basis, from a sample of stations. Ex. 8002 (Gray WDT) at 27-28. In contrast, Dr. Erdem’s *ratings* methodology uses an annualized national average of station-level sweeps ratings, on a program-by-program basis, from the universe of

commercial stations. Ex. 7000 (Erdem WDT) at 6-7, 13-15. The methodologies are comparable only in that they both rely ultimately on Nielsen estimates of local viewership, which is collected – but generally not reported – on a quarter-hour basis. *See* Tr. 293:1-6 (Lindstrom). The comparison ends there. IPG’s mathematical exemplar in ¶ 98 of its Proposed Findings of Fact therefore is not record evidence. Moreover, that example is incorrect and has nothing to do with Dr. Erdem’s methodology. As Dr. Erdem explained on the stand, when asked questions along these lines:

A. ... I mean, what you’re describing is not in my report. It doesn’t affect my numbers. I don’t have a zero viewing problem. ...

Q. And, again, you’re looking at it from a broadcast-by-broadcast zero viewing basis?

A. And that’s the thing. I’m not doing a broadcast-by-broadcast analysis. I’m not using quarter-hour level data. I’m not using market level data. I’m not using broadcast. It’s all national.

Tr. 118:12-119:11 (Erdem).

11. **IPG ¶¶ 108-116.** For these reasons, IPG’s proposed findings related to “zero viewing” on a quarter-hour basis have no application whatsoever to Dr. Erdem’s use of local ratings. *Id.*; *see also* Tr. 121:1-14 (Erdem). It is correct that Dr. Erdem uses sweeps data, which is only available for up to 16 weeks a year, because that is when the sweeps periods are, and that he has no local viewing information for the remainder of the year. *see* Ex. 7001 (Sanders WDT) at 12-13. But this does not mean that during the weeks when there is no sweeps data “‘zero viewing’ automatically exceeds 69%” or more. IPG ¶ 109. IPG’s postulation is without any record evidence or support. Dr. Erdem does not impute zeros for the months or programs for which he is missing data – they are simply not included in his analysis. Ex. 7000 (Erdem WDT) at 17, 20-21.

12. **IPG ¶¶ 110-111.** IPG again misinterprets record evidence and incorrectly characterizes as “zero viewing” a *different* kind of data limitation that does play a role in Dr. Erdem’s local ratings analysis – where a program otherwise meeting Nielsen’s reportability standards has viewership too low for Nielsen to measure on a particular station (rather than in a particular quarter hour). An absence of measurable viewing in a market where viewing is measured is a data point, not an absence of data. Tr. 117:9-119:19, 121:11-122:6 (Erdem). It is therefore useful data that Dr. Erdem uses, along with data from other markets with measurable viewing. *Id.* IPG has offered no alternative approach.

13. **IPG ¶ 110.** IPG’s math in ¶ 110 attempting to illustrate the issue of no measurable viewing in a market is incorrect, in part because IPG relies on data from the wrong column in the RODPs. When Dr. Erdem computes average ratings for a program that does not receive an average rating in the R-7 table, he calculates it as “the sum of *number of households* from the Nielsen Audience data divided by the number of households in the covered markets” Ex. 7000 (Erdem WDT) at 12 (emphasis added). This is the same method that Nielsen uses to compute average ratings that appear in the R-7 tables. Tr. 112:14-113:25 (Erdem); Tr. 121:1-122:6 (Erdem). So, for example, Nielsen estimated positive viewing of the program “Dr. James Kennedy” on 154 out of 183 stations during the July 1999 sweep month. Ex. 7005 (Mayhue Declaration), NSI Average Week Estimates for “Dr. D. James Kennedy” for “July 1999” at column 13. Viewership on the remaining 29 stations was too low for Nielsen to estimate.

D. IPG Offered No Evidence That Any Programs Omitted From Nielsen Reports Have Any Value In These Proceedings

14. **IPG ¶¶ 103-106.** Because of Nielsen’s reportability standards, not all programs claimed by SDC and IPG appear in the RODPs. Ex. 7000 (Erdem WDT) at 6-7. Without any record evidence, IPG repeatedly asserts that IPG’s omitted programs are “significant.” IPG ¶¶ 103,

106. The programs for which the parties lack viewership data are predominantly specials that do not air on a regular basis. Ex. 7000 (Erdem WDT) at 9 n.14; Ex. 7001 (Sanders WDT) at 20-21.

15. **IPG ¶¶ 103-106.** Further, the IPG-claimed programs that aired on WGNA during the eleven years at issue in this proceeding had a *total of six compensable telecasts*. Ex. 7000 (Erdem WDT) at 16 n.25. Because of the lack of predictability as to whether or when any of these six broadcasts would take place, and without any evidence to measure the relative value of the programming, there is no basis in the record to support the claim that any of the programs was a driver of cable or satellite subscriptions, or had any value to cable or satellite operators, during the time period in question. *Id.*; Tr. 240:9-14 (Sanders). At any rate, without any evidence of viewership or other evidence of value, it would be pure speculation to seek to put a value on the SDC and IPG programs that do not appear in any ratings data presented in this case. Ex. 7000 (Erdem WDT) at 16 n.25; Tr. 241:20-242:7 (Sanders). If IPG has evidence that these programs have any value, much less “significant” value, this proceeding was its opportunity to present that evidence. IPG failed to make any showing in this regard.

16. **IPG ¶ 96.** To challenge Dr. Erdem’s methodological approach, IPG (1) exaggerates the number of SDC programs missing from the RODPs (even though the absence of such programming from the RODPs would diminish the SDC’s share and boost IPG’s under Dr. Erdem’s methodology); and (2) mischaracterizes the amount of data that goes into the R-7 Table in the RODPs. First, the SDC are not claiming “132 separate programs” as IPG ¶ 96 asserts. The titles listed in Appendix C of Mr. Sanders’s Written Direct Testimony are not all separate programs. Many listings are alternative titles for the same programs. Others are one-off telecasts or occasional specials that, like IPG’s unrated telecasts, are not aired on a regular or predictable basis. Claims are made by claimants, not titles. The SDC are comprised of 33

claimants in this proceeding, not all of which have made claims in both funds for every year. Ex. 7001 (Sanders WDT) at App. B. Only regularly scheduled Devotional programs meeting a minimum threshold of viewership are included in the RODPs. Ex. 7000 (Erdem WDT) at 6-7. IPG's arithmetic seeking to establish a hypothetical number of "data points" that Dr. Erdem "could have been deemed" to have had is unsupported by any record evidence.

E. IPG's Criticisms of Dr. Erdem's Tests Using Distant HHVH Data Are Unsupported by the Record.

17. **IPG ¶ 85.** Dr. Erdem used the distant HHVH data solely for the purpose of conducting hypothesis tests to show that the relationship between local ratings and distant viewership was positive and statistically significant, and that it remained stable over time. Ex. 7000 (Erdem WDT) at 18-20. (Unlike Dr. Gray, Dr. Erdem does not use regression to calculate shares, but only to test hypotheses.¹) Dr. Erdem's finding corroborates the expert testimony of Ms. Berlin and Mr. Sanders establishing that local viewership is reasonably predictive of out-of-market viewership, particularly in neighboring markets where the vast majority of "distant" retransmissions take place. Ex. 7003 at Tr. 81:8-82:11 (Berlin); Ex. 7001 (Sanders WDT) at 14-15; Tr. 185:20-186:20 (Sanders). No record evidence challenges the validity of the distant HHVH data, or Dr. Erdem's use of it.

18. **IPG ¶ 85.** Dr. Erdem's distant HHVH data for 1999 is the same data that the SDC had in the 1999 cable proceeding, supplied by Alan Whitt, a former contractor for MPAA (with

¹ IPG ¶ 49. Although not directly relevant to Dr. Erdem's methodology, IPG also misinterprets Dr. Gray's regression results. In Dr. Gray's regression results, a negative coefficient for a program category does not suggest negative viewing or negative value. Tr. 480:10-24 (Gray). For example, "Health" programming is not "valued" at "-2.436333," and "Music" programming is not "valued" at "0.905276". Ex. 8002 (Gray WDT) at 52. Rather, the coefficient simply implies that at a given level of local viewership and distant subscribership, and controlling for other factors incorporated in Dr. Gray's regression, "Health" programming is expected to have lower distant viewing than Dr. Gray's omitted category, and "Music" programming is expected to have higher distant viewing than Dr. Gray's omitted category. Tr. 486:24-488:5 (Gray). Interpreting any regression coefficient as a measure of value (or viewership, or anything else other than a correlation) would be a gross and incorrect oversimplification, reflective of a failure to understand or properly apply regression analysis. *Id.*

MPAA's permission). *See Distribution of the 1998-1999 Cable Royalty Funds*, Final distribution determination, Docket No. 2008-1 CRB CD 98-99 (Phase II), 80 Fed. Reg. 13423, 13431 n.32 (Mar. 13, 2015). Dr. Erdem also used distant HHVH data for 2000 through 2003 that MPAA produced in discovery. Tr. 62:14-24 (Erdem). Further foundation for this data is established in the testimony of Mr. Paul Lindstrom (Ex. 8001 (Lindstrom WDT) at 4-6) and the designated testimony of Ms. Marsha Kessler (Ex. 8010 (Kessler Designated WDT) at 10-14). Dr. Erdem did not develop, design, or commission the studies, underscoring the fact that they are neutral studies not tailored to favor the SDC in any way. Tr. 62:14-24 (Erdem).

19. **IPG ¶ 84.** Dr. Erdem testified that based on discussions with Nielsen, reports of distant viewing for years after 2003 do not exist and are not available. Tr. 62:6-13 (Erdem). Mr. Sanders likewise testified based on multiple conference calls with Nielsen that Nielsen was unable to provide any HHVH data regarding distant signal viewing after 2003. Ex. 7001 (Sanders WDT) at 14. This testimony is consistent with Mr. Lindstrom's testimony that Nielsen's systems that housed older data "were no longer supported and no longer available to be able to be used." Tr. 310:19-21 (Lindstrom). Mr. Lindstrom indicated that there were also issues of data sets and data retention, and that recovery of the data would have required the very time-consuming process of recreating software, making the task "impossible given the time and money that could be done with what the Judges were looking for, for this proceeding." Tr. 310:6-311:14 (Lindstrom). One cannot blame Nielsen for not offering to undertake such a substantial task, even if it could be accomplished at all. Although MPAA was able to obtain Nielsen *PeopleMeter* data – not sweeps data – for the years 2008 and 2009, this data was not available in all markets and would not have been useful in the Devotional category. SDC

Findings of Fact and Conclusions of Law ¶ 32 n.3 (citing Tr. 362:14-23 (Lindstrom) and Tr. 476:7-479:20 (Gray)).

20. **IPG ¶¶ 96, 100.** It is not correct that “according to [Dr.] Erdem, from 1999-2003, an average of twelve devotional programs appeared during a given year.” IPG ¶ 100. Rather, it would be more accurate to say that from 1999-2003, an average of twelve claimed Devotional programs appeared in both the RODPs and the distant HHVH data, giving Dr. Erdem 60 data points from which to calculate a correlation and conduct hypothesis tests. Tr. 77:4-79:11 (Erdem), Ex. 7000 (Erdem WDT) at 18-19 and 30, Ex. 3. (Some programs in the distant HHVH data would not appear in the RODPs due to Nielsen reportability standards, and some programs in the RODPs would not appear in the distant HHVH data because they were not broadcast on stations in the HHVH station sample.) In Dr. Erdem’s opinion (not contradicted by any IPG testimony), a minimum of ten data points would have been necessary to conduct a reliable simple linear regression (an application of the well-known “one-in-ten” rule of thumb in statistical analysis). Tr. 134:5-8 (Erdem). (Of course, each data point used by Dr. Erdem in his regressions was itself an aggregation of between dozens and hundreds of local rating data points, each of which was further an aggregation by Nielsen of thousands of observations. For example, *Hour of Power*’s national average rating of 1.0 for May, 1999, is derived from that program’s carriage on 165 stations, reaching a projected audience of 1,000,000 households. Ex. 7005 (Mayhue) (NSI May 1999).)

21. **IPG ¶¶ 57, 60-62, 66, 115-116.** Unlike the local sweeps ratings from the RODPs, the distant HHVH data that Dr. Erdem uses contains quarter-hour level data, including instances of zero observed viewing. But there is no evidence in Mr. Lindstrom’s testimony or elsewhere in the record that levels of “zero viewing” have increased over time, nor is there any evidence that

the number of “zero viewing” instances is relevant. *See* Ex. 8001 (Lindstrom WDT) at 8. Zeros, like positive numbers, are data. As Dr. Gray explained at length (using multiple analogies), zeros can be aggregated with other data to draw reliable conclusions. Tr. 424:14-426:3 (Gray). Furthermore, as Dr. Gray also explained, it is necessary to correctly distinguish zeros from missing data, which is not the same thing. Tr. 430:22-431:11 (Gray). Although the Librarian at one time expressed concern related to the number of “zero viewing” instances (66 Fed. Reg. 66433, 66450 (Dec. 26, 2001), vacated at 69 Fed. Reg. 23821 (Apr. 30, 2004)), these concerns have long since been addressed. In determinations subsequent to the Librarian’s vacated determination in the 1993-97 cable proceeding, the Judges have recognized that “‘zero viewing’ sampling points can be considered important elements of information, rather than defects in the process.” *Distribution of 2000-2003 Cable Royalty Funds*, 78 Fed. Reg. at 64995. Again, IPG has presented no relevant evidence that supports any of its proposed findings regarding its own definition of “zero viewing.”

F. IPG’s Speculation About Other Data or Analyses Not Presented Is Not Useful.

22. **IPG ¶¶ 89-90, 103-106.** Many things are unknown, which is why decisions must be based on the information available. Tr. 188:12-17 (Sanders) (“[W]e’re often called upon to make decisions without all the information that we would like . . . [I]n all the analyses that I do, I would, one, try to confirm one set of data with another set of data as we did in this case, but at the end of the day there’s also an element of rationality and common sense that comes into play[.]”). If IPG has better information or a better way of analyzing the information available, it should have been offered for the record. Instead, IPG presented no information or analysis into evidence, and presented no rebuttal testimony to the information and analysis presented by Dr.

Erdem and Mr. Sanders. It is far too late now to speculate as to what other information or analysis might have presented had IPG chosen to do so.

II. RESPONSE TO PROPOSED CONCLUSIONS OF LAW

A. IPG's Central Legal Argument Was Copied Verbatim from the SDC's 2010-2013 Allocation Phase Proposed Findings of Fact and Conclusions of Law.

23. **IPG ¶¶ 123-132.** IPG presents ten paragraphs, constituting six pages of text and every legal reference cited by IPG in its Proposed Conclusions of Law, that are taken verbatim from the SDC's Proposed Conclusions of Law filed in the 2010-2013 Allocation Proceeding. *See* Docket No. 14-CRB-0010-CD (2010-13) (the "SDC's 2010-2013 Proposed Findings and Conclusions"). This unauthorized copying of an opposing party's legal work constitutes willful copyright infringement. *See, e.g., Newegg Inc. v. Ezra Sutton, P.A.*, 2016 WL 6747629 (C.D. Cal. Sep. 13, 2016) (denying defense of fair use, and granting summary judgment against defendant law firm for copying plaintiff's legal brief).

24. **IPG ¶¶ 123-132.** IPG's counsel's wholesale appropriation of the SDC's work product without consent or attribution also constitutes plagiarism in breach of professional responsibility owed to the Judges and other parties in this proceeding. This concern has been voiced by multiple courts, for example:

The memorandum plagiarizes Defendants' memorandum in significant part, copying the legal portions of it on all counts except for Count III virtually verbatim. On Count III Plaintiff's counsel has cited no legal authority. Throughout the brief, Plaintiff's counsel has inserted his own facts and conclusions, contrary to those written by defense counsel, but it is clear that he did no legal research and remained content to let defense counsel do all the work. ...

Plagiarism is unacceptable in any grammar school, college, or law school, and *even* in politics. It is wholly intolerable in the practice of law.

Dewilde v. Guy Gannett Pub. Co., 797 F. Supp. 55, 56 n.1 (D. Me. 1992); *see also In re Ayeni*, 822 A.2d 420 (D.C. 2003) (disbarring attorney for misappropriating client funds and plagiarizing

a co-defendant's brief); *Kilburn v. Republic of Iran*, 441 F. Supp. 2d 74, 77 n.2 (D.D.C. 2006) ("Without implying that this omission [of a proper citation] was the product of anything more than sloppy lawyering, the court impresses upon defense counsel its intolerance for plagiarism."); *U.S. v. Bowen*, 194 Fed. App'x 393, 402 n.3 (6th Cir. 2006) ("We made it very clear to [counsel] during oral argument this behavior is completely unacceptable and reiterate it here as an admonishment to all attorneys tempted to 'cut and paste' helpful analysis into their briefs"); *Venesevich v. Leonard*, 2008 WL 5340162, at *2 n.2 (M.D. Pa. Dec. 19, 2008) ("[Attorney's] plagiarism is professional misconduct, and it is unacceptable behavior by a member of the bar"); *Iowa Supreme Court Attorney Disciplinary Bd. v. Cannon*, 789 N.W.2d 756 (Iowa 2010) (ordering public reprimand for attorney who filed a brief that plagiarized a published writing); *Consolidated Paving, Inc. v. County of Peoria, Ill.*, 2013 WL 916212, at *6 (C.D. Ill. Mar. 8, 2013) ("Plagiarism is a serious issue, and several courts have found such behavior unacceptable and a violation of the Rules of Professional Conduct that govern attorneys' behavior. ... This Court does not look lightly upon passing off as one's own the analysis and work of another."); *Ayala v. Lockheed Martin Corporation*, 2017 WL 838490, at *12 (V.I. Super. Ct. Mar. 3, 2017) ("Imitation may be the highest form of flattery, but plagiarism is no compliment because '[t]he essence of plagiarism is deceit.'" (quoting *In re Lamberis*, 443 N.E.2d 549, 552 (Ill. 1982))).²

25. **IPG ¶¶ 133-149.** The remaining paragraphs in IPG's Proposed Conclusions of Law lack citation to any legal authority whatsoever, in violation of the Judges' order requiring that "Participants shall support each proposed conclusion of law with one or more citations to

² The SDC reserves the right to file a motion seeking additional or appropriate relief from the misconduct in this case.

relevant legal authority or authorities.” *Order on Joint Motion Re Post-Hearing Scheduling*, Apr. 19, 2018.

B. The SDC’s Viewership-Based Methodology Is Consistent with Precedent in Phase II/Distribution Proceedings.

26. **IPG ¶¶ 123-132.** The record in this proceeding confirms that, consistent with prior Phase II/Distribution proceedings, viewership is the most relevant and appropriate measure of relative value among relatively homogeneous programs. *See Distribution of 2000-2003 Cable Royalty Funds*, 78 Fed. Reg. at 64986 (“actual measured viewing is significant to determining relative marketplace value.”); *Independent Producers Group v. Librarian of Congress*, 792 F.3d 132, 142 (D.C. Cir. 2015) (“viewership remains ‘significant to determining the marketplace value’ of programming.”); *Distribution of 1998-1999 Cable Royalty Funds*, 80 Fed. Reg. at 13442.

27. **IPG ¶¶ 132, 148-149.** The Judges’ task in Distribution proceedings is to assess value within a relatively homogeneous category of programming, where viewership is the “predominant heuristic” that a CSO would consider. *Distribution of the 2000-2003 Cable Royalty Funds*, 78 Fed. Reg. at 64992-93 (finding that “CSO would rely to a greater extent on absolute viewership levels” in determining the value it would place on programming within a homogeneous category like Devotional programming). Here, as in prior Distribution proceedings, the “record testimony supports the conclusion that viewership data is a useful metric in determining relative market value[.]” *Distribution of 1998-1999 Cable Royalty Funds*, 80 Fed. Reg. at 13429. Accordingly, the Judges should once again “reject IPG’s argument that household viewing cannot constitute a measure of value” among Devotional programs. *Id.*

28. **IPG ¶¶ 132, 146, 148-149.** The Judges have specifically relied on the relationship between local ratings and distant viewing as measured by HHVH data to support use of local ratings as a valuation measure. *Id.* at 13442. Evidence presented by the SDC’s witnesses in this

proceeding confirms that there is a strong and statistically significant relationship between local ratings and distant viewership, such that local ratings are an appropriate and reliable measure of relative market value in the Devotional category. In addition to Dr. Erdem's data analyses (*see* Ex. 7000 (Erdem WDT) at 18-20), Mr. John Sanders testified that industry participants actually rely on local ratings to evaluate how a program or station will perform out of market, and that "[v]iewership generally translates well from market to market, both in and out of market." Ex. 7001 (Sanders WDT) at 14-15. This is consistent with Ms. Toby Berlin's testimony that, as VP of Program Acquisition at DIRECTV, she regularly relied on local ratings when distant ratings were unavailable, and that such data were "good indicators" and would be "transportable to making business judgments" relating to distant carriage in both the satellite and cable TV contexts. Ex. 7003 at Tr. 81:8-82:20 and Tr. 63:14-64:13 (Berlin) (noting similarities between cable and satellite TV.).

C. The SDC's Methodology Uses the Best Available Data.

29. **IPG ¶ 142.** In the initial proceeding, the Judges expressed concern that the "SDC's *implementation* of its methodology suffer[ed] from a critical lack of data," but reserved judgment on whether the SDC's methodology itself would be useful for determining the relative market value of the Devotional programming at issue. *Order Reopening Record and Scheduling Further Proceedings*, May 4, 2016, at 5 and n.8 ("*Order Reopening Record*") (emphasis added). Since that time, the SDC have obtained significantly more data to resolve the Judges' concerns. Instead of only February RODPs, the SDC now have either the full RODPs or the R-7 tables for 37 out of the 44 sweeps periods for the years at issue in this proceeding, and instead of only one years' worth of distant viewing data, the SDC now have distant HHVH data for five years from 1999-2003. Tr. 63:2-24 (Erdem). The 1999 HHVH data used in the initial proceeding and the

newly obtained 2000-2003 HHVH data are the only extant source of sweeps data for distant viewing during the time period relevant to this proceeding. Tr. 62:6-13 (Erdem); Tr. 258:17-259:2 (Sanders); Tr. 310:6-311:14 (Lindstrom). No further additional data beyond what the SDC have presented is accessible. See Tr. 258:17-259:2 (Sanders). In addition, the data and analysis provided by Dr. Gray corroborate Dr. Erdem's conclusions regarding the correlation between local and distant viewing of television programming through the period 1999-2009, and the utility of using local ratings as a benchmark for distant viewing in determining the relative shares of the parties.

30. **IPG ¶¶ 143-144.** The Judges' concerns regarding the insufficiency of the 2000-2003 HHVH data as it related to the MPAA's methodology in the initial proceeding have no bearing on Dr. Erdem's use of 1999-2003 HHVH data in this proceeding. Unlike Dr. Gray in the initial proceeding, Dr. Erdem does not rely on distant HHVH data to calculate shares or to predict distant viewership. *Order Reopening Record* at 4-5 ("Unlike MPAA's methodology, which employs predicted distant viewership values, the SDC's methodology uses national averages of local ratings, 'scaled' by numbers of distant subscribers who are able to access the programs."). Rather, Dr. Erdem uses the HHVH data only to confirm the commonsense notion that local ratings are strongly correlated with distant viewership and that the relationship between local ratings and distant viewership is statistically significant and remains stable over time. Ex. 7000 (Erdem WDT) at 18-20; Ex. 7001 (Sanders WDT) at 14-15; *Distribution of 1998-1999 Cable Royalty Funds*, 80 Fed. Reg at 13442. The additional four years' worth of distant HHVH data enabled Dr. Erdem to more effectively test that relationship, and allows the Judges to make a rational, non-arbitrary allocation of the Devotional royalties based on substantial evidence in the

record. 5 U.S.C. § 706; *Nat'l Assoc. of Broadcasters v. Copyright Royalty Tribunal*, 146 F.3d 907, 923 (D.C. Cir. 1992); *see also* Ex. 7000 (Erdem WDT) at 19-20; Tr. 64:5-17 (Erdem).

31. **IPG ¶¶ 143-144.** Dr. Erdem's hypothesis tests are supportive of Mr. Sanders's testimony as an expert in media valuation that local ratings in RODPs were a reasonable proxy for distant viewership for the 1999-2009 period and Ms. Berlin's testimony that she relied on local ratings to make distant carriage decisions. Given this, and given that the SDC's measure of viewership is the only methodology for assessing the relative market value of Devotional programming in the record of this proceeding, it would be unreasonable to reject the SDC's methodology due to their inability to procure additional confirmatory data that is simply unavailable. *See, e.g., Distribution of 1998-1999 Cable Royalty Funds*, 80 Fed. Reg. at 13443 ("The Judges will not compound the problem of the absence of the most theoretically probative evidence by rejecting the SDC's viewer-centric valuations, notwithstanding the limitations in using those valuations.").

32. **IPG ¶ 145.** The SDC's use of local Nielsen RODP data to determine the value of distantly retransmitted Devotional programming is consistent with the Judges' finding in the 1999 cable case that "the viewership data for the SDC and IPG programs in the local market ... served as an 'analogous' market by which to estimate the distribution of royalties in th[e] proceeding...." *Id.* at 13442. IPG failed to present any evidence of viewership or other evidence of value relating to programs that fall below Nielsen's reportability standards (i.e., those shows that are not regularly scheduled or that are not ranked due to low ratings). It would be inappropriate to speculate as to the value of any IPG or SDC programming that do not appear in any ratings data in this case, as "there is certainly no basis to allow for compensation of a program in the absence of *any* evidence of viewership." *Id.* at 13441 (emphasis in original).

33. **IPG ¶ 147.** IPG persistently confuses instances of “missing” data with instances of “zero-viewing.” But Dr. Erdem does not treat “missing” data as “zeros,” and “zero viewing” on a station-by-station or quarter-hour basis has no application to Dr. Erdem’s use of annualized national averages of local ratings. *See Distribution of the 2000-2003 Cable Royalty Funds*, 78 Fed. Reg. at 64995 (“[U]nder the hypothetical market construct, royalties would accrue on a program-by-program basis to individual copyright owners, not to the distantly retransmitted stations.”). As to actual instances of zero viewing, witnesses in this proceeding reiterated what the Judges have previously accepted: that “‘zero-viewing’ sampling points can be considered important elements of information, rather than defects in the process.” *Distribution of 1998-1999 Cable Royalty Funds*, 80 Fed. Reg. at 13436 (citing *Distribution of the 2000-2003 Cable Royalty Funds*, 78 Fed. Reg. at 64995). In any event, IPG has not provided any evidence, let alone “persuasive or sufficient evidence of ‘zero viewing’ for individual SDC and IPG programs to invalidate any reliance on the SDC methodology.” *Id.* at 13437.

III. CONCLUSION

34. The Judges should award royalty funds in the Devotional category for 2004-2009 cable and 1999-2009 satellite as set forth in the SDC's Proposed Findings of Fact and Conclusions of Law at paragraph 62.

Respectfully submitted,

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May 18, 2018

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent electronically on May 18, 2018, to the following:

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Certificate of Service

I hereby certify that on Friday, May 18, 2018 I provided a true and correct copy of the Settling Devotional Claimants' Response to Proposed Findings of Fact and Conclusions of Law to the following:

Independent Producers Group (IPG), represented by Brian D Boydston served via Electronic Service at brianb@ix.netcom.com

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Signed: /s/ Jessica T Nyman